

MARJORIE P. NEWCOMB

IBLA 70-21

Decided December 29, 1970

Desert Land Entry: Extension of Time

An extension of time to submit final proof of the reclamation and cultivation of the land in a desert land entry may be granted upon a satisfactory showing that the entryman's failure to reclaim the land within the statutory life of the entry was due, without fault on his part, to unavoidable delay in the construction of irrigation works intended to convey water to the entered land; to the extent that the failure to achieve timely reclamation of the land is attributable to financial reverses suffered by the entryman subsequent to allowance of his entry and to unforeseeable delay, unrelated to any act of the entryman, in obtaining necessary irrigation equipment, the delay will be recognized as having been unavoidable.

IBLA 70! 21

: Idaho 06400

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: Application for extension of time to file
: desert land entry final
: proof rejected; entry
: canceled

: Reversed and remanded

DECISION

Marjorie P. Newcomb has appealed to the Secretary of the Interior from a decision dated December 13, 1968, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of the Idaho land office denying her request for an extension of time in which to submit final proof of her desert land entry, Idaho 06400, and canceling the entry.

The record shows that appellant's application to make desert land entry in the SE 1/4, S 1/2 NE 1/4 and lots 1 and 2 sec. 3, T. 10 S., R. 25 E., Boise Mer., Idaho, was allowed on September 24, 1964. First-year proof, filed on October 20, 1965, showed expenditures of over \$ 2,000.00 for the drilling of an irrigation well in the SE 1/4 sec. 3 and \$ 750.00 for 1-1/2 miles of fence on the east and north sides of the entry.

On August 13, 1968, after she had been advised by the land office that final proof for her entry was due by September 24, 1968, appellant applied for a one-year extension of time. She stated that she had been "unable to get the crops in which were necessary to make final proof" because of a strike affecting one main supplier of sprinkler systems and her inability to make timely financial arrangements with another.

By a decision dated September 11, 1968, the land office denied appellant's request. It reported that a field examination of the entry on August 23, 1968, revealed that the only improvements made upon the land consisted of the fencing of the east side and the drilling of the well. Finding that there was no evidence of the plowing or breaking of soil or the performance of any type of

development or reclamation work subsequent to allowance of the entry, 1/ the land office held that four years were more than sufficient time to reclaim the land and to obtain necessary irrigation facilities, and that appellant had not shown an unavoidable delay in the construction of irrigation works for which she was not responsible. It concluded that it was evident from the record that appellant could not submit acceptable final proof by September 24, 1968, and it therefore declared the entry canceled.

In a letter to the land office manager, dated October 13, 1968, appellant stated that she was not appealing from the decision of September 11, 1968, but that she was requesting reconsideration of that decision by the land office. In support of her request, she alleged that 1966 was an agricultural disaster year in the area and that, as a result of losses suffered in that year, she was "unable to do anything in 1967 except recoup, mainly through the Federal Land Bank Loan." She submitted, in substantiation of this allegation, a copy of a part of her husband's federal income tax return for 1966, which showed net farm loss of \$ 34,440.01 that year. In the spring of 1968, she stated, an attempt to have the work completed was frustrated by last-minute delay in the form of a strike.

Appellant's letter of October 13, 1968, was treated as an appeal to the Director, Bureau of Land Management. In its decision of December 13, 1968, the Office of Appeals and Hearings concluded that appellant had not made a diligent effort to cultivate or irrigate the land in her entry during its statutory life, and that, therefore, the request for an extension of time was properly denied. In so concluding, it found that appellant had submitted no evidence in refutation of the finding of the land office that no plowing, breaking of the soil or other type of development or reclamation work had been performed since the entry was allowed. The Office of Appeals and Hearings also held that the lack of necessary finances to perform the required work was not a reason that would warrant an extension of time.

In appealing to the Secretary from the Bureau's action, appellant challenges the finding that no work was performed on the entry after September 24, 1964, alleging for the first time expenditures in excess of the \$ 2,750.00 reported in her first-year

1/ The well on the land was drilled between February 20 and May 11, 1964, prior to allowance of appellant's entry, allowance having been predicated upon a showing of an adequate supply of water to irrigate the land in the entry.

proof and asserting that she spent over \$ 6,000.00 on the entry between 1963 and 1966. She further contends that the strike by the Ames Company, as well as a bad drought in 1966, were conditions beyond her control, and that her good faith is shown by her work and her expenditures.

In response to a request from this office for a more detailed accounting of her expenditures and of the work performed on the entry, appellant has submitted the following:

1. Copies of the well driller's report and statement for services rendered, indicating an expenditure of \$ 2,430.00 for the drilling of a well in 1964;
2. Statement of Herman Mix and Herman Clark, dated July 1, 1970, that they built a four-wire fence on the east side of section 3, T. 10 S., R. 25 E., in 1964, at an estimated cost of \$ 700.00, and that they built a half fence on the north side of the east half of the section in 1966 at an estimated cost of \$ 350.00;
3. Statement of Jim Bailey, dated July 1, 1970, that he, with Gary Wickel, "Wheatland plowed approximately 210 acres in the south part of east half of Section 3" in 1966 at an estimated cost, at current commercial rates, of \$ 840.00; 2/
4. Copy of contract executed on May 26, 1966, together with explanatory statement showing expenditure of \$ 3,497.50 for a pump to be installed on the well on the entry; and
5. Copy of check of September 19, 1969, in the amount of \$ 12,000.00, to J. B. Knight Company, together with explanation that the check was in settlement, after a lengthy disagreement over delivery of goods and purchase price, of an account for the purchase, in April 1967, of:
 - 75 pieces of 6-inch aluminum main line
 - 30 pieces of 8-inch aluminum main line
 - 9 lines of 4-inch portable laterals of 1/4 mile length.

The act of March 28, 1908, 43 U.S.C. § 333 (1964), authorizes the granting of an extension of time, not to exceed three years,

2/ We note that the "approximately 210 acres," reportedly plowed in 1966, reflects an increase of 30 acres over the "about 180 acres" attested to in a statement of Bailey dated October 12, 1968, which was submitted to the Director, Bureau of Land Management.

in which to submit final proof of the reclamation of a desert land entry, in the discretion of the Secretary of the Interior, to an entryman who

. . . shall show to the satisfaction of the . . . [Secretary of the Interior or such officer as he may designate] that he has in good faith complied with the terms, requirements, and provisions of . . . [the desert land act] but that because of some unavoidable delay in the construction of the irrigating works, intended to convey water to the said lands, he is, without fault on his part, unable to make proof of the reclamation and cultivation of said land, as required

In determining what constitutes unavoidable delay in the construction of irrigation works, without fault on the part of an entryman, the Department has held, in general, that any factor causing delay which the entryman should have been able to anticipate, or which he could have done more to remedy than he did, is not sufficient to make the required showing. More specifically, it has held that financial inability to perform the required acts, existing from the commencement of the entry, or misfortune occurring when it is already too late to perform those acts cannot be relied upon to show unavoidable delay. See Calvin L. Howard, Jenadean Howard, A-31060 (March 17, 1970), and cases cited therein. The Department has not held, however, that financial reverses occurring during the life of an entry, while time remains to accomplish the required acts, should not be considered as an element of unavoidable delay.

Appellant, as we have seen, attributes her failure to complete the required acts of cultivation and reclamation within the prescribed period of time to crop failure resulting from drought in 1966, which made her financially unable to continue with development of the entry until 1968, and to a strike in the latter year which made it impossible to secure the necessary irrigation equipment to permit timely reclamation of the land. It appears that she has made a substantial investment in this venture, and, to the extent that her failure to achieve compliance with the requirements of the law may be attributed to the factors alleged, we find that there was unavoidable delay in the construction of irrigation works without fault on the part of the entrywoman.

Although appellant applied only for a one-year extension, which would have already expired, the statute, supra, permits a three-year extension. This would extend the period for filing

final proof to September 24, 1971. Accordingly, we hold that appellant shall have until that date in which to submit final proof.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), the decision appealed from is reversed, and the case is remanded to the Bureau of Land Management for appropriate action consistent with this decision.

Martin Ritvo, Member

I concur:

I concur:

Anne Poindexter Lewis, Member

Newton Frishberg, Chairman

